NO. 84-744

In The Supreme Court of the United States
October Term, 1984

UNITED STATES OF AMERICA,
PETITIONER

vs.

JAMES C. LANE AND DENNIS R. LANE,
RESPONDENTS

BRIEF OF REPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA, Petitioner
vs.
JAMES C. LANE AND DENNIS R. LANE,
Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents, James C. Lane and Dennis R. Lane, respond to the Petition of the United States for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit, as follows:

STATEMENT

Respondents adopt, for the purpose of this response, the contents of the Government's Petition under the headings, "Question Presented," "Opinion Below," "Jurisdiction," "Rules Involved," and "Statement."

RESPONSE TO REASONS FOR GRANTING THE PETITION

Petitioner seeks a writ of certiorari to resolve an apparent conflict among the circuits concerning the question presented, *i.e.,* whether misjoinder in violation of Rule 8(b), Federal Rules of Criminal Procedure, is *per se* prejudicial, or is subject to the harmless error evaluation of Rule 52(a). Candor requires that Respondents acknowledge that there is an apparent conflict among the Circuit Courts of Appeal on the question presented. Such a conflict is among the reasons generally considered as worthy of review by certiorari. Sup. Ct. R. 17.1(a). Upon the question presented, Respondents assert that the proper course is for this Court to deny certiorari, or, in the alternative, grant certiorari and affirm the Judgment of the Court of Appeals, for the reasons discussed *infra.*

Although there is an apparent conflict among the Circuits on the question presented, the position of the Fifth Circuit is correct and in accord with the decision of this Court in *McElroy v. United States,* 164 U.S. 76 (1896). In the *McElroy* case this Court established a *per se* rule of prejudice arising from misjoinder. Rule 8 embodies a "statutory right expressly conferred," a "specific command of Congress," determining the proper limits of joinder and its inherent prejudice. Application of the harmless error rule to misjoinder would be inconsistent with legislative history and the intent of the rule-making authority, and an unreasonable construction of Rule 8 and Rule 52. Further, reasons of judicial economy justify a rule of *per se* prejudice for misjoinder in violation of Rule 8.

The Government argues that Rule 52(a) should be applied to misjoinder. The difficulty with this argument is that this Court has ruled otherwise. In *McElroy v. United*

States, 164 U.S. 76 (1896), in interpreting the statutory forerunner to Rule 8, and ruling upon an assertion of harmless error from misjoinder, this Court observed that

> [i]t cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions. The order of consolidation was not authorized by statute and did not rest in mere discretion.

id. at 81. The Government takes the position that *McElroy,* "while often cited for the proposition that misjoinder is prejudicial per se, in fact does not establish such a rule." Petition at 10, n. 10. Relying upon *United States v. Granello,* 365 F.2d 990 at 995 (2nd Cir. 1966), and substituting elipses for significant language, the Government takes the position that *McElroy* is limited to its facts. Petition at 10, n. 10. To the contrary, the decision in *McElroy,* in a general statement of the logical underpinnings of Rule 8, stated that "it cannot be said *in such case* that all the defendants may not have been embarrassed and prejudiced in their defense . . . ." *McElroy v. U.S., supra* at 81. (emphasis added). The language in *McElroy* indicates a *per se* rule of prejudice from misjoinder, and there is no indication that the rule was limited to the facts of that case.

This rule of *per se* prejudice has a sound basis in reason, as it is factually and logically impossible to disprove prejudice in cases of misjoinder in violation of Rule 8(b).

> In cases of felony the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury or otherwise,

> that it is the settled rule in England and in many of our states to confine the indictment to one distinct offense, or restrict the evidence to one transaction.

McElroy v. United States, supra at 80. "A risk of prejudice, either from evidentiary spillover or transference of guilt, inheres in any joinder of offenses or defendants." *King v. United States,* 355 F.2d 700, 703 (1st Cir. 1966). "The dangers of transference of guilt . . . are so great that no one really can say prejudice to substantial rights" does not occur with misjoinder. *Kotteakos v. United States,* 328 U.S. 750 at 774 (1946).

Examination of Rules 8(b) and 52(a), and their legislative history, and reasonable construction of these rules, support a determination that misjoinder is *per se* prejudicial. Rule 8 and Rule 13 are, in substantial part, recodifications of a statute which formerly appeared as Revised Statutes § 1024. The notes of the Advisory Committee on Rules with respect to Rules 8 and 13 indicate that they are substantially restatements of existing law. Thus the construction of §1024 of the Revised Statutes [now Rule 8] announced in *McElroy v. United States, supra,* still applies. *See Schaffer v. United States,* 362 U.S. 511, 521 (1959) (Douglas, J., dissenting); *U.S. v. Graci,* 504 F.2d 411 at 413 (Cir. 1974).

The earliest explicit statutory predecessor of the Rule 52(a) appears to have been §269 of the Judicial Code, Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181. It might be argued that this 1919 Amendment to the Judicial Code was intended to limit the joinder rule and thereby to limit the effect of the court's opinion in *McElroy.* But we are dealing with statutory rights expressly conferred. *U. S. v. Graci, 504 F.2d 411 at 414 (3rd Cir. 1974); see Kotteakos v. U.S.,* 328 U.S. 750 (1946). Congress has in Rule 8 and Rule 13 defined the permissable scope of joint trials of offenses and offenders. It has in Rule 14 provided a mechanism for protecting against prejudice even within the permissable

scope. It seems a strained interpretation of the harmless error statute that it was intended to dilute statutory protections expressly granted. *U.S. v. Graci, supra* at 414. The view that violations of Rule 8 and Rule 13 cannot be treated as harmless is expressed by Cipes in 8 Moore's Federal Practice, ¶8.04[2] (1965) and by Professor Wright in Wright, Federal Practice and Procedure, Criminal § 144, at 328-29 (1969). *See also United States v. Graci,* 504 F.2d 411, at 414 (3rd Cir. 1974).

This Court has recognized in *Kotteakos v. United States,* 328 U.S. 750 (1946), that errors which represent departure from a "specific command of Congress" are possible exceptions to the harmless error rule. Rule 8 constitutes a "statutory right expressly conferred," which carries the force of a "specific command of Congress." Rule 8 is an enactment of this Court under the rule-making authority delegated by Congress under Title 18. U.S.C. § 3771. As such, it constitutes "a specific command," with the authority of Congress under the Necessary and Proper Clause, in furtherance of Article III of the Constitution. *Hanna v. Plumer,* 360 U.S. 460 at 472 (1965). Accordingly, the harmless error rule should be construed as inapplicable to Rule 8.

Guilt is both individual and personal. *Kotteakos v. United States,* 328 U.S. 750, 773; *United States v. Turkett,* 632 F.2d 896 (1st Cir. 1980). Thus, a defendant charged with committing multiple crimes is entitled to a separate trial for each crime that is not "substantially part of the same transaction," *McElroy v. United States, supra; United States v. Turkett, supra;* one accused with others, has "the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others[.]" *Kotteakos, supra,* at 775. Nevertheless, joinder of offenses or parties has the salutory effect of promoting judicial economy. Fed. R. Crim. P. 8

balances the competing considerations of the benefit to the court, prosecution, and the public with the presumptive prejudice inherent in the consolidation of parties or offenses by permitting joinder if certain requirements are met. Rule 8 "set the limits of tolerance" beyond which the danger of prejudice outweighs the benefit, and any joinder which does not fall within Rule 8 "is *per se* impermissible." *King v. United States,* 355 F.2d 700, 703 (1st Cir. 1966); *United States v. Turkett, supra* at 906. Rule 8 is a final determination, by the rule-making authority, of the permissable limits of joinder and the prejudice inherent in such joinder, *King v. United States, supra,* and these competing interests should not be continually re-evaluated under the Harmless Error Rule. *See Kotteakos v. United States, supra* at 773. For the Federal courts to engage in the same weighing and comparison of the competing interests of prejudice and judicial economy in each case of misjoinder, as requested by the Government, would be inconsistent with Rule 8, and its history.

The construction which the Government advocates would bring Rule 8 and Rule 52 into square conflict, eviscerating Rule 8 and rendering it redundant of Rule 14. Certainly the rule-making authority intended no such construction and "[t]he two sections must be construed and applied so as to bring them into substantial harmony, not into square conflict." *Kotteakos v. United States, supra* at 775. Such an internal inconsistency in the Rules of Criminal Procedure is not a reasonable construction of the intent of the rule-making authority. As Professor Charles Wright has observed:

> Indeed there would be no point in having Rule 8 if the harmless error concept were held applicable to it. If that concept could be applied, then defendant could obtain reversal only if the joinder were prejudicial to

him. But Rule 14 provides for relief from prejudicial joinder, and a defendant can obtain reversal, in theory at least, if he has been prejudiced even though the joinder was proper. If misjoinder can be regarded as harmless error, then reversal could be had only for prejudice whether the initial joinder was proper or improper. If that were true, it would be pointless to define in Rule 8 the limits on joinder, since it would no longer be of significance whether those limits were complied with, and the draftsman would have been better advised to allow unlimited joinder of offenses and defendants, subject to the power of the court to give relief if the joinder were prejudicial.

1 C. Wright, Federal Practice and Procedure, 329 (1969).

The history of Rule 52(a) shows that its general object was to preserve appellate review while eliminating a "multiplicity of loopholes." *Kotteakos v. United States, supra,* at 760. The purpose of the rule in its final statutory form was stated authoritatively to be

> [t]o cast upon the party seeking a new trial the burden of showing that any technical errors that he may complain of have affected his substantial rights, otherwise they are to be disregarded. [But,] [t]he . . . legislation affects only technical errors. If the error is of such a character that the natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will, notwithstanding this legislation, rest upon the one who claims under it.

H. R. Rep. No. 913, 65th Cong. 3d Sess., 1; *Kotteakos v. United States, supra* at 760.

It is clear from the history of the Harmless Error Rule that it was concerned with "technical errors, defects, or exceptions which do not affect the substantial rights of the parties." Rule 52(a), however, omits the words "technical errors" and substitutes the general term "any error",

while still exempting "substantial rights." Because Rule 52(a) omits the words "technical errors" which was previously included in the Statute, some have construed this as an enlargement of the scope of the Harmless Error Rule, and that "these changes [i.e., from "technical errors" to "any error"] indicate a Congressional intent to emphasize the concept that any error not causing detriment should be disregarded . . ." *U. S. v. Seidel,* 620 F.2d 1006 at 1013 (4th Cir. 1980). But Rule 52(a) by its own terms does not apply to errors affecting "substantial rights." Therefore, in addressing the question presented, this Court must determine whether misjoinder in violation of Rule 8(b) is a mere "technical error," or affects "substantial rights." "If the error is of such a character that its natural effect is to prejudice a litigant's substantial rights," the Harmless Error Rule should not apply to misjoinder. *See Kotteakos v. U.S., supra* at 760.

Respondents contend that misjoinder is inherently prejudicial and is of such a character that its natural effect is to prejudice a litigant's substantial rights. "A risk of prejudice, either from evidentiary spillover or transference of guilt, inheres in any joinder of offenses or defendants," and "[T]he dangers of transference of guilt . . . are so great that no one can really say prejudice to substantial rights" does not occur with misjoinder. *Kotteakos v. United States, supra* at 774. Misjoinder historically has been considered objectionable and prejudicial, for the reasons expressed in *McElroy v. U.S., supra* at 80. Accordingly, it is the settled rule to confine an indictment to one distinct offense, or restrict the evidence to one transaction. *McElroy v. U.S., supra* at 80. Rule 8 embodies this principal, and constitutes an express grant of a "substantial right." This Court has expressly ruled, in *Kotteakos v.*

United States, supra, that the rule against misjoinder embodies a substantial right. That right is the right not to be tried *en masse* for a conglomeration of distinct and separate offenses committed by others. *Kotteakos v. U.S., supra* at 775. It is not "harmless error" to violate a fundamental procedural rule designed to prevent "mass trials." *Ingram v. United States,* 272 F.2d 567 (4th Cir. 1959).

Considerations of judicial economy support a rule of *per se* prejudice from misjoinder. The Government proposes the application of Rule 52(a) to misjoinder, so that appellate courts will be required to engage "in the same sort of carefully inquiry into the possibility of prejudice that has characterized the proper application of the harmless-error rule in other contexts", a rule that would require appellate courts to "undertake the same examination with respect to Rule 8" as applied in reviewing complaints of prejudicial joinder and abuse of discretion under Rule 14. Petition at 11. This would necessitate case-by-case, laborious, tedious, time-consuming study of trial evidence by the reviewing court. But the Federal Courts are "far too busy to be spending countless hours reviewing trial transcripts in an effort to determing the likelihood that error may have affected a jury's deliberations." *United States v. Hasting,* _____U.S._____. 103 S.Ct. 1874 at 1984 (1983) (STEVENS, J., concurring). "A defendant's liberty should not so often depend upon our struggle with the particular circumstances of a case to determine from a cold record whether or not the . . . [error was] . . . harmless." *United States v. Hasting, supra,* at 1990 n. 6 (BRENNAN, J., concurring in part and dissenting in part), quoting *United States v. Rodriguez,* 627 F.2d 110 (7th Cir. 1980). Harmless error review consumes

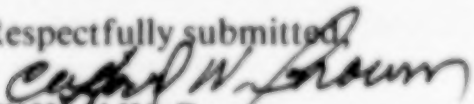
valuable and scarce judicial time and resources. A rule of *per se* prejudice from misjoinder has the beneficial effect of precluding review of trial evidence by an over-burdened appellate court, thus conserving judicial resources and promoting judicial economy. A rule of *per se* prejudice from misjoinder has the beneficial effect of deterring misjoinder, thereby reducing the risk of reversal, and the attendant burden of subsequent retrials on remand. Accordingly, this Court should continue to adhere to the rule of *per se* prejudice from misjoinder first announced in *McElroy v. United States, supra.*

The rule against jointly indicting and trying different defendants for unconnected offenses is a long-established procedural safeguard. Its purpose is to prohibit exactly what was done here, namely, allowing evidence in a case against one Defendant to be presented in the case against another charged with a completely disassociated offense, with the danger that the jury might feel that the evidence against the one supported the charge against the other. The error in this case was not harmless; Respondents were prejudiced by misjoinder. The error requires reversal of Respondents' convictions.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondents, James C. Lane and Dennis R. Lane, pray that the Petition for writ of certiorari be denied, or, in the alternative, if the Petition is granted, that this Court enter its judgment affirming the Judgment of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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